Guideline Sentencing Update

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Departures

Mitigating Circumstances

Eleventh Circuit holds that departure may be warranted when use of the statutory maximum under §5G1.1(a) effectively negates the reduction for acceptance of responsibility. Defendant was convicted on two counts that each carried a statutory maximum sentence of four years. Because his guideline range was 135–168 months, he was sentenced to eight years pursuant to §§5G1.1(a) and 5G1.2(d). Defendant argued that the effect of using the statutory maximum as the final sentence was to deprive him of the benefit of the three-level reduction he had received for acceptance of responsibility, that his sentence would have been the same whether he accepted responsibility or not. The district court agreed, but held that it had no authority to depart and had to impose the eight-year sentence.

The appellate court remanded, concluding first that "a district court has the same discretion to depart downward when §5G1.1(a) renders the statutory maximum the guideline sentence as it has when the guideline sentence is calculated without reference to §5G1.1(a). Section 5G1.1(a) is simply the guidelines' recognition that a court lacks authority to impose a sentence exceeding the statutory maximum. Section 5G1.1(a) was not intended to transform the statutory maximum into a minimum sentence from which a court may not depart in appropriate circumstances." *Accord U.S. v. Cook*, 938 F.2d 149, 152–53 (9th Cir. 1991); *U.S. v. Sayers*, 919 F.2d 1321, 1324 (8th Cir. 1990); *U.S. v. Martin*, 893 F.2d 73, 76 (5th Cir. 1990).

The court then held that departure may be considered here. "We find no evidence in the sentencing guidelines, policy statements, or commentary of the Commission that it considered, or recognized the implications of, the interaction of §5G1.1(a) and §3E1.1 in cases such as this. . . . We think that the Commission failed to consider that §5G1.1(a) might operate to negate the §3E1.1 adjustment and undermine the 'legitimate societal interests' served by the adjustment." The court reasoned that "one of the 'legitimate societal interests' served by rewarding a defendant's acceptance of responsibility is providing an incentive to engage in plea bargaining. . . . If a defendant knows that, under §5G1.1(a), he will receive the same sentence regardless of whether he accepts responsibility, he will be more likely to shun plea bargaining and go to trial. . . . Allowing a departure based on acceptance of responsibility in such circumstances preserves the possibility of some sentencing leniency and thus serves society's legitimate interest in guilty pleas and plea bargaining. We hold, therefore, that a district court has the discretion to reward a defendant's acceptance of responsibility by departing downward when §5G1.1(a) renders §3E1.1 ineffectual in reducing the defendant's actual sentence."

U.S. v. Rodriguez, 64 F.3d 638, 642–43 (11th Cir. 1995) (per curiam).

See *Outline* generally at VI.C.5.a.

Second Circuit affirms, with modification, downward departure to allow defendant to enter special in-prison drug treatment program. Defendant pled guilty to two drug counts and faced a sentence of 130–162 months. At sentencing, however, the district court departed downward to the five-year mandatory minimum, partly because it felt defendant had committed the offenses largely to feed his drug addiction and because defendant had participated in a drug education program before sentencing, wanted to continue treatment in prison, and "had a genuine desire for rehabilitation." This sentence was overturned on appeal in *U.S. v. Williams*, 37 F.3d 82, 86 (2d Cir. 1994), with the court holding that defendant's efforts did not satisfy the test set forth in *U.S. v. Maier*, 975 F.2d 944, 946–49 (2d Cir. 1992) (rehabilitative efforts may be considered but must be "extraordinary" and admission to treatment program is not "an automatic ground for" departure).

By the time defendant was resentenced he had completed the drug education program and been accepted into an intensive, pilot treatment program at the federal prison in Butner, N.C. One requirement for admission to the program was that the inmate be 18–36 months away from a confirmed release date. The district court concluded that defendant's "admission to the selective drug treatment program based on objective factors and his subjective willingness to commit to the program regimen was a significant changed circumstance" that would allow departure. The court also "noted that 18 U.S.C. §3553(a)(2)(D) mandates a sentencing court to take account of the defendant's need for 'medical care[] or other correctional treatment in the most effective manner,'" and that without a departure the pilot program would not be available to defendant for several years, if at all. The court imposed the same five-year sentence, which included a 10-year term of supervised release so that "if even once he goes back to the drug life he led before . . . [defendant] will go back to prison for a period of time comparable to that required by the guidelines."

This time the appellate court affirmed the departure, although it remanded for stricter conditions of super-

vised release. "To say that admission to a drug treatment program is not 'an automatic ground for obtaining a downward departure' . . . is not to say that it can never be the basis for such a departure, provided that there exist other compelling circumstances not adequately considered by the Commission. . . . On remand, the district court did not depart from the guidelines sentencing range of 130 to 162 months simply because Williams had entered a drug treatment program. It departed because, on the facts of this case, there was effectively no other sentence that would accord with the requirements of 18 U.S.C. §3553(a)(2)(D). The district court determined that Williams was an excellent candidate for rehabilitation given his prior history, demeanor, post-arrest resolve, and acceptance into a 'special and selective' treatment program based on criteria devised by experts in the field."

"We believe that the district court had the authority to depart downward in order to facilitate Williams's rehabilitation given the atypical facts of this case, which place it outside the 'heartland' of usual cases involving defendants who may benefit from drug treatment. . . . We clarified in *Williams I* that 'demonstrated willingness' to rehabilitate one's self must be manifested by objective indicia of extraordinary efforts to that end. 37 F.3d at 86. But when a defendant who has been in federal custody since his arrest has had no opportunity to pursue any rehabilitation, when he has been admitted to a selective and intensive inmate drug treatment program, and when a sentence within the guideline range would effectively deprive him of his only opportunity to rehabilitate himself while incarcerated, we think a departure is within the district court's discretion. If the Sentencing Commission did not give adequate consideration to the mitigating circumstance of drug rehabilitation generally, *Maier*, 975 F.2d at 948, it certainly did not consider the unique constellation of mitigating circumstances in this case."

However, the court concluded that the supervised release term was unreasonable because defendant "could simply withdraw from the Butner program at any time [and] go free at the end of five years while similar defendants who committed similar crimes would serve another six to nine years." The district court should add two special conditions: (1) when defendant's prison term is over, he must "present to his probation officer certification from a drug treatment program at his place of incarceration that he has entered an available program at the first opportunity and remained in this program until the earlier of his release from confinement or the completion of the program, and that he is currently drug-free," and (2) he must submit to drug testing during his supervised release and, if so directed, must continue to participate in an approved drug treatment program.

U.S. v. Williams, 65 F.3d 301, 303–09 (2d Cir. 1995).

See *Outline* at VI.C.4.a.

Offense Conduct

Calculating Weight of Drugs

Tenth Circuit holds that waste by-products should not be included in weight of methamphetamine mixture for mandatory minimum calculation. Defendant pled guilty in 1989 to possession with intent to manufacture methamphetamine. He possessed 28 grams of pure methamphetamine that was combined with waste water in a mixture weighing 32 kilograms, and his 188-month sentence was based on the entire weight of the mixture. In Nov. 1993, §2D1.1, comment. (n.1), was amended to exclude materials, such as waste water, that must be separated from a drug "mixture or substance" before use. The amendment was made retroactive, and defendant filed a motion under 18 U.S.C. §3582(c) for resentencing. The district court granted the motion and sentenced defendant to the 60-month mandatory minimum term required for offenses involving 10 or more grams of methamphetamine. The government argued that the amended guideline definition does not control for purposes of 21 U.S.C. §841(b), and that defendant should receive a 10-year mandatory minimum for possessing "1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine."

The appellate court affirmed. Although in *U.S. v. Killion*, 7 F.3d 927 (10th Cir. 1993), decided before the 1993 amendment, the court had held that the weight of waste by-products may be used to calculate base offense levels under §2D1.1, "we have never specifically interpreted [§841(b)] apart from the guideline to require the inclusion of waste water in its definition of 'mixture or substance.'" The court looked to *Chapman v. U.S.*, 500 U.S. 453 (1991), and its finding "that Congress 'adopted a "market-oriented" approach to punishing drug trafficking,' which punished according to the quantity distributed 'rather than the amount of pure drug involved.' . . . *Chapman*'s recognition of Congress' 'market-oriented' approach dictates that we not treat unusable drug mixtures as if they were usable. . . . This usable/unusable distinction . . . [in defining] 'mixture or substances' for statutory purposes also permits us to refer to the guideline definition and 'adopt a congruent interpretation of the statutory term as an original matter.'" Concluding that there are persuasive reasons to "construe 'mixture or substance' in section 841 to be consistent with the guideline commentary as revised," such as avoiding "unnecessary conflict and confusion," the court held "that section 841 does not include the weight of waste by-products in the measurement of a 'mixture or substance.'"

U.S. v. Richards, 67 F.3d 1531, 1534–38 (10th Cir. 1995) (Baldock, J., dissenting).

See *Outline* at II.B.1.

Sixth Circuit holds that weight of "liquid LSD" should be calculated under amended guideline method, but that *Chapman* still applies to calculation for mandatory minimum. Defendant was originally sentenced on the basis of the total weight of 6.2 grams of a "liquid LSD" mixture, which consisted of 5.1 milligrams of pure LSD dissolved in a liquid. After the Nov. 1, 1993, amendment to §2D1.1 changed the way LSD weight was calculated under the Guidelines (Amendment 488) and was made retroactive, defendant filed a motion for reduction of sentence. The district court denied the motion, holding that Amendment 488 did not apply because the new method involved LSD on a carrier medium and defendant's offense involved liquid LSD without a carrier medium.

The appellate court remanded. Although Amendment 488 does not refer to liquid LSD, "Application Note 18 provides that, in the case of liquid LSD, 'using the weight of the LSD alone to calculate the offense level may not adequately reflect the seriousness of the offense. In such a case, an upward departure may be warranted.' Guidelines, §2D1.1. By allowing an upward departure in cases where a carrier medium is not used, the Sentencing Commission remains consistent with the market-oriented approach to sentencing for drug crimes. Using the 0.4 milligram standard, rather than the actual weight of the liquid, to measure dosage seems to be the logical means to determine the level of departure. Therefore, Defendant's sentence under the Guidelines must be recalculated accordingly."

Using only the 5.1 milligrams of pure LSD results in a guideline range for defendant of 10–16 months. "If the district court finds that this sentence does not reflect the seriousness of Defendant's offense, it may depart upward by applying the 0.4 milligram standard of Amendment 488. According to the Drug Enforcement Agency, the quantity of pure LSD per dose is 0.05 milligrams. When divided by 0.05 milligrams, the 5.1 milligrams of LSD involved in Defendant's case results in 102 doses of the drug. When the 102 doses are multiplied by Amendment 488's 0.4 milligram standard weight for each dose, the resulting weight is 40.8 milligrams. In this case, no increase in the sentencing level results. The base offense level for less than 50 milligrams of LSD is level 12, requiring a sentence of 10–16 months." *See also U.S. v. Turner,* 59 F.3d 481, 484–91 (4th Cir. 1995) (in light of Amendment 488 and Note 18, use weight of pure LSD in liquid LSD and depart if appropriate; however, if weight of pure LSD cannot be adequately proved, calculate weight by determining number of doses in liquid LSD and multiplying by DEA standardized figure of 0.05 mg of pure LSD per dose) [8 *GSU* #1].

However, because the Sixth Circuit has held "that Amendment 488 does not overrule" *Chapman v. U.S.*, 500 U.S. 453 (1991), "courts should continue to use the entire weight of LSD and its carrier medium to determine the mandatory minimum sentence required by statute, while using the standardized weight to determine the sentencing range provided in the guidelines. . . . When *Chapman* is applied to this case, the weight of the liquid LSD, 6.2 grams, triggers the five year mandatory minimum sentence for Defendant."

U.S. v. Ingram, 67 F.3d 126, 128–29 (6th Cir. 1995).

See *Outline* at II.B.1.

Determining the Sentence

Consecutive or Concurrent Sentences

Seventh Circuit holds that home detention is not a "term of imprisonment" under §5G1.3. When defendant was sentenced in federal court she had served a 14-month state prison term and had been in home detention for over a year on the same offense. The federal court credited the 14-month prison term against her federal sentence because the state offense had been fully accounted for in determining the sentence for the related federal charge; however, the court refused to credit the time spent in home detention. Defendant appealed, arguing that §5G1.3(b) required the court to credit her home detention as an "undischarged term of imprisonment" attributable to offenses "fully taken into account in the determination of the offense level for the instant offense."

The appellate court affirmed the sentence, concluding that "term of imprisonment" must be defined under federal law and that the Guidelines do not treat home detention as imprisonment. Using state definitions "would lead to divergent aggregate sanctions depending on which state the crime occurred in, undermining the most basic purpose of the Sentencing Reform Act of 1984 and the Guidelines themselves. The meaning of 'imprisonment' therefore is a question of federal law, one depending on what states *do* rather than on the labels they attach to their sanctions. . . . 'Imprisonment' is a word used throughout the Guidelines to denote time in a penal institution. . . . Section 7B1.3(d) permits a judge to require a recidivist to serve a period of 'home detention' in addition to a period of 'imprisonment,' showing that the Guidelines distinguish the two. . . . 'Home detention' differs from 'imprisonment' throughout the Guidelines' schema. It is not 'imprisonment' but is a 'substitute for imprisonment.' *See* §5B1.4(b)(20). . . . Unless something in §5G1.3 overrides this understanding, Phipps's sentence is just right." *But cf. U.S. v. French,* 46 F.3d 710, 717 (8th Cir. 1995) (using state law to hold that parole term was an "undischarged term of imprisonment" for §5G1.3(b)).

U.S. v. Phipps, 68 F.3d 159, 161–62 (7th Cir. 1995).

See *Outline* generally at V.A.3.

Supervised Release and Probation

Ninth Circuit holds that courts may not order repayment of court-appointed attorney's fees as condition of supervised release, later holds same for probation. In the first case, the district court ordered as a condition of defendant's supervised release that he repay the Criminal Justice Act attorney's fees expended on his behalf within one year of his release from prison; failure to comply would result in reincarceration. The appellate court reversed. Supervised release is governed by 18 U.S.C. §3583(d), which sets mandatory conditions and "then states that a court may impose additional supervised release conditions that meet the following criteria. First, they must be reasonably related to the factors set forth in §§3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D). These factors are: consideration of 'the nature and circumstance of the offense and the history and characteristics of the defendant;' 'to afford adequate deterrence to criminal conduct;' 'to protect the public from further crimes of the defendant;' and 'to provide the defendant with needed [training], medical care, or other correctional treatment in the most effective manner.' . . . The recoupment order simply bears no relationship to any of these goals. It is not related to Eyler's underlying criminal conduct—unlawful possession of firearms—and has no rehabilitative effects. Nor does it further any deterrence goals, protect the public from future crimes, or provide Eyler with any training or treatment. . . . The discretion of a district court to impose conditions of supervised release that it considers appropriate is limited by the express provisions of §3853(d). A condition that a defendant repay CJA attorneys fees violates these provisions and, accordingly, exceeds the district court's authority."

U.S. v. Eyler, 67 F.3d 1386, 1393–94 (9th Cir. 1995).

See *Outline* at V.C.

In the later case, defendant was sentenced to probation with the condition that he repay his CJA attorney's fees within one year. The appellate court reversed. "The statute governing probation, 18 U.S.C. §3563, . . . allows for the imposition of discretionary conditions as long as they are reasonably related to the purposes of sentencing in 18 U.S.C. §3553(a)(1) & (2)." Reimbursement of attorney's fees is not a mandatory condition of probation, and in the case above the court held that it is not reasonably related to the goals of §§3553(a)(1) and (a)(2)(B)–(D). "Therefore, the question before us is whether the repayment of attorney's fees is reasonably related to [the purposes of] 18 U.S.C. §3553(a)(2)(A), and whether it involves only such deprivation of liberty or property as is reasonably necessary to accomplish the purposes of sentencing. We conclude that repayment of attorney's fees is not a valid condition of probation because it is not reasonably related 'to the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,' 18 U.S.C. §3553(a)(2)(A). We also conclude that because the government has a number of other less drastic means by which it can enforce a court order to repay attorney's fees, conditioning probation on repayment of fees is not reasonably necessary to any legitimate sentencing objective."

U.S. v. Lorenzini, No. 94-30409 (9th Cir. Dec. 13, 1995) (Reinhardt, J.) (Fernandez, J., dissenting). Cases before the Sentencing Reform Act of 1984 took effect split on whether former 18 U.S.C. §3561 authorized repayment of attorney's fees as a condition of probation. *Compare U.S. v. Gurtunca,* 836 F.2d 283, 287–88 (7th Cir. 1987) (authorized, but lack of funds would be defense against revocation for nonpayment) *and U.S. v. Santarpio,* 560 F.2d 448, 455–56 (1st Cir. 1977) (same—"the condition cannot be enforced so as to conflict with Hamperian's sixth amendment rights; if Hamperian is unable to pay the fees, revocation of probation for nonpayment would be patently unconstitutional") *with U.S. v. Jimenez,* 600 F.2d 1172, 1174–75 (5th Cir. 1979) (§3561 does not allow for reimbursement as condition of probation).

See *Outline* generally at V.B.

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